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January 25, 1994



Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W. Room 222  
Washington, D.C. 20554

**CTIA**

Cellular  
Telecommunications  
Industry Association  
1133 21st Street, NW  
Third Floor  
Washington, DC 20036  
202-785-0081 Telephone  
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RECEIVED

JAN 26 1994

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: Ex Parte  
Docket No. 93-252 (Regulatory Parity)

Building The  
Wireless Future ..

Dear Mr. Caton:

On Tuesday, January 25, 1994, the Cellular Telecommunications Industry Association ("CTIA") sent the attached letters and White Paper, to the FCC staff listed below.

Daniel Abeyta  
Rudy Baca  
Beverly Baker  
Andrew Barrett  
Thomas Beers  
Lauren Belvin  
James Bennett  
Karen Brinkmann  
Kelly Cameron  
John Cimko  
Jonathan Cohen  
Rodney Small  
Randy Coleman  
Robert Corn-Revere  
Diane Cornell  
Ruth Dancey  
Ervin S. Duggan  
Brian Fontes  
Bruce Franca  
David Furth  
Bart Gorman  
Sheldon Guttman  
Ralph Haller  
Jeffrey Hoagg  
John Hollar  
Reed Hundt  
Stevenson Kaminer  
Michael Katz  
William Kennard  
Kimberly King

Evan Kwerel  
Blair Levin  
Kathy Levitz  
Renee Licht  
Byron Marchant  
Steve Markendorff  
Roland Martin  
Geraldine Matise  
Maura McGowan  
Ruth Milkman  
Tom Mooring  
Kent Nakamura  
Linda Oliver  
Myron Peck  
Dr. Robert Pepper  
James Quello  
David Reed  
Jill Ross-Meltzer  
Sarah Siedman  
David Siddall  
Richard Smith  
David Solomon  
Thomas Spavins  
Merrill Spiegel  
Dr. Tom Stanley  
Gerald Vaughan  
Greg Vogt  
John Williams  
John Winston

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Mr. Caton  
January 25, 1994  
Page 2

If there are any questions in this regard, please contact the undersigned.

Sincerely,



Robert F. Roche

Enclosure



January 25, 1994

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Cellular  
Telecommunications  
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Commissioner Andrew C. Barrett  
Federal Communications Commission  
1919 M Street, N.W. Room 826  
Washington, D.C. 20554

Re: Ex Parte  
Docket No. 93-252 (Regulatory Parity)

**Building The  
Wireless Future ..**

Dear Andy:

Thomas E. Wheeler  
President/CEO

The attached White Paper, *What Is A Commercial Mobile Service Provider?*, addresses the question of what constitutes a commercial mobile service, and how such services should be classified and treated under the provisions of the Omnibus Budget Reconciliation Act of 1993.

Congress has made clear its intention that services which look alike to customers should be treated in a like manner. Thus, commercial mobile services include both mobile services that are "provided for a profit and make[] interconnected service available" *and* their functional equivalents are substitutes for one another and should be classified as commercial mobile services and regulated in a like manner.

The White Paper reasons that the appropriate tests to determine functional equivalence are product substitutability and customer perception.

The paper concludes that by relying on a broad construction of the definition and by treating both these services and their functional equivalents as "Commercial Mobile Services," *and by applying regulatory forbearance to such services*, the Commission will limit regulatory gamesmanship and properly focus licensees' energies on competing on the merits in the marketplace.

By so doing, the Commission will provide new opportunities and incentives for such providers to offer innovative and efficient services, and foster a competitive wireless marketplace.

Very Truly Yours,

  
Thomas E. Wheeler

Attachments

January 25, 1994

Dr. Thomas Stanley  
Chief Engineer  
Federal Communications Commission  
2025 M Street, N.W. Room 7002  
Washington, D.C. 20554

  
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Re: Ex Parte  
Docket No. 93-252 (Regulatory Parity)

**Building The  
Wireless Future .**

Dear Tom:

Thomas E. Wheeler  
President/CEO

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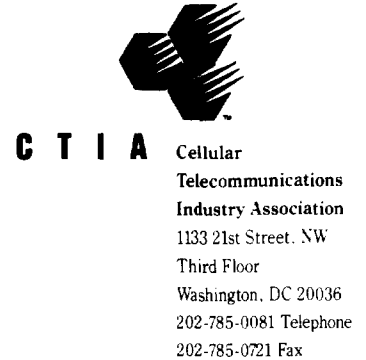
By so doing, the Commission will provide new opportunities and incentives for such providers to offer innovative and efficient services, and foster a competitive wireless marketplace.

Very Truly Yours,

  
Thomas E. Wheeler

Attachments

January 25, 1994



Dr. Robert Pepper  
Chief, Office of Plans & Policy  
Federal Communications Commission  
1919 M Street, N.W. Room 822  
Washington, D.C. 20554

**Building The  
Wireless Future**

Thomas E. Wheeler  
President/CEO

Re: Ex Parte  
Docket No. 93-252 (Regulatory Parity)

Dear Bob:

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Very Truly Yours,



Thomas E. Wheeler

Attachments

January 25, 1994



Commissioner James H. Quello  
Federal Communications Commission  
1919 M Street, N.W. Room 802  
Washington, D.C. 20554

Re: Ex Parte  
Docket No. 93-252 (Regulatory Parity)

**Building The  
Wireless Future .**

Thomas E. Wheeler  
President/CEO

Dear Jim:

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Very Truly Yours,



Thomas E. Wheeler

Attachments

January 25, 1994

Commissioner Ervin S. Duggan  
Federal Communications Commission  
1919 M Street, N.W. Room 832  
Washington, D.C. 20554

Re: Ex Parte  
Docket No. 93-252 (Regulatory Parity)

Dear Ervin:

The attached White Paper, *What Is A Commercial Mobile Service Provider?*, addresses the question of what constitutes a commercial mobile service, and how such services should be classified and treated under the provisions of the Omnibus Budget Reconciliation Act of 1993.


Congress has made clear its intention that services which look alike to customers should be treated in a like manner. Thus, commercial mobile services include both mobile services that are "provided for a profit and make[] interconnected service available" *and* their functional equivalents are substitutes for one another and should be classified as commercial mobile services and regulated in a like manner.

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Very Truly Yours,

  
Thomas E. Wheeler

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**Building The  
Wireless Future**

Thomas E. Wheeler  
President/CEO

January 25, 1994

Chairman Reed Hundt  
Federal Communications Commission  
1919 M Street, N.W. Room 814  
Washington, D.C. 20554

  
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Re: Ex Parte  
Docket No. 93-252 (Regulatory Parity)

Dear Mr. Chairman:

The attached White Paper, *What Is A Commercial Mobile Service Provider?*, addresses the question of what constitutes a commercial mobile service, and how such services should be classified and treated under the provisions of the Omnibus Budget Reconciliation Act of 1993.

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Thomas E. Wheeler

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**Building The  
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Thomas E. Wheeler  
President/CEO





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**Building The  
Wireless Future**

***PCS WHITE PAPER No. 2  
Second Series***

***What Is A Commercial Mobile Service Provider?***

***January 25, 1994***

## What Is A Commercial Mobile Service Provider?

The Omnibus Budget Reconciliation Act of 1993 created a new classification system for mobile service, defining two broad general categories: Commercial Mobile Service, and Private Mobile Service.

A new section of the Communications Act defines Commercial Mobile Service as *"any mobile service (as defined in section 3(n)) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission."*<sup>1</sup>

The Communications Act was also amended to provide the following definition of "mobile service":

'Mobile service' means a radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves, and includes (1) both one-way and two-way radio communications services, (2) a mobile service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations (whether licensed on an individual, cooperative, or multiple basis) for private one-way or two-way land mobile communications by eligible users over designated areas of operation, and (3) any service for which a license is required in a personal communications service established pursuant to the proceeding entitled 'Amendment to the Commission's Rules to Establish New Personal Communications Services' (GEN Docket No. 90-314; ET Docket No. 92-100), or any successor proceeding.<sup>2</sup>

*What really constitutes a commercial mobile service?* It is undeniable that all current common carrier mobile services, such as cellular and common carrier paging services are CMS. But Congress also made it clear that its intent is to ensure that services which look alike to customers will be treated in a like manner. Thus, Congress directed that all functionally-equivalent services would also be treated as CMS. For example, as was clearly stated during mark-up, CMS is "broadly defined to include PCS, and enhanced special mobile radio services (ESMRs), and cellular-like services."<sup>3</sup>

But CMS should not be construed as a narrow, fixed set of services, such as "cellular-like." Such a narrow construction would both invite regulatory gamesmanship in order to obtain artificial marketplace advantages and risk rapid obsolescence as new mobile services and technologies develop.

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<sup>1</sup>47 U.S.C. Section 332(d)(1) (1993).

<sup>2</sup>47 U.S.C. Section 153(n) (1993).

<sup>3</sup>Rep. Edward J. Markey, Statement at the Mark-up of Budget Reconciliation, Subtitle C Licensing Improvement Act of 1993, H.R. 2264 (May 11, 1993).

By relying on a broad construction of CMS (which already includes, under PCS, "a broad family of services") and by treating both these services *and their functional equivalents* as CMS, the Commission will limit regulatory gamesmanship and properly focus licensees' energies on competing in the marketplace on the merits.

## **What Are The Tests For Commercial Mobile Service Classification?**

There are three tests for determining what is a Commercial Mobile Service (CMS).

These tests include:

- ◆ that service is provided for a profit.
- ◆ that it makes available interconnected service, *i.e.*, services interconnected with the public switched telephone network.
- ◆ that it is available to the public, or a "substantial portion" of the public.

These tests are specified by the Omnibus Budget Reconciliation Act, and are generally consistent with traditional tests of common carriage as incorporated in the Communications Act.

### ***What do these tests really mean?***

***"For Profit" Service.*** The "for profit" test distinguishes purely internal and integrated non-commercial services from for-profit equivalents of CMS. Defining the test broadly to include services which may have components (such as interconnection) which are resold at cost will avoid any incentive to develop artificial distinctions in order to create and exploit regulation-based advantages in the marketplace.

***"Interconnected" Service.*** Interconnected service should be defined as a "service that allows a subscriber to send or receive messages over the public switched network." Attempts to impose fine distinctions predicated on such criteria as "real-time" access or customer control are fraught with the risk of encouraging companies to create artificial and unnecessary features in order to exploit differential regulatory treatment. The straight-forward definition will allow technology, not regulation, to determine the most efficient serving arrangements and network configurations.

Moreover, such artificial distinctions rest on a fragile assumption that, for example, a store-and-forward capability somehow transforms a commercial or "public" communications service from common to non-common carriage. Under such a construct, would telegraphy have been classified as a common or private carrier service? What of a publicly-offered electronic mail or other record service, would it be private or common carriage?

Similarly, efforts to establish quantified thresholds for interconnection as a basis for classification risk imposing unnecessary costs and reporting requirements on all providers -- commercial and private -- for minimal customer benefit. Assigning different regulatory status on the basis of differing types of interconnection also ignores both technological developments and invites regulatory gamesmanship, risking distortion of the marketplace and of the technical configuration of telecommunications networks. A far better, and simpler, solution is to classify all interconnected services as CMS, and subject them to regulatory forbearance, eliminating the incentive for gamesmanship and technological inefficiency.

*"The Public" or "Classes of Eligible Users."* The Conference Report makes it clear that CMS includes services available to "broad or narrow classes of users so as to be effectively available to a substantial portion of the public."<sup>4</sup> This is consistent with the courts' reading of the common law test regarding carriers, which relied upon a "holding out" of service to the public -- and not the size of the potential user population -- as the test for classification.<sup>5</sup>

System capacity, service area size, and location are *not* appropriate tests for CMS classification. While they may serve as technical or geographic limitations on the potential user population -- the same tests would not be regarded as proper for the classification of other telecommunications services or providers. For example, that an SMR provider may serve 12,000 users does not render it any more "private" a service than would a rural or cooperative telephone company's 10,000 wireline users render it a private or non-common service provider.

Any SMR services which satisfy the tests for CMS classification *or* which are the functional equivalents of CMS should be classified as CMS. SMR services which do not provide interconnection, which are not provided to the public, and which are properly not the functional equivalent of CMS should be the only SMR services classified as private mobile services.

## What Obligations Fall On Commercial Mobile Service Providers?

The Act has been amended to indicate that CMS providers, to the extent they are engaged as CMS providers, are to be treated as common carriers under the Act.<sup>6</sup> Thus, they are obligated to furnish service upon reasonable request, charge just and reasonable rates, and practice no unjust and unreasonable discrimination. But, as is indicated below, this results in no new burdens being imposed on how such providers conduct their business. For example, the House Report clearly states that the Commission may find that "commercial mobile services need not be tariffed at all."<sup>7</sup>

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<sup>4</sup>H.R. Conf. Rep. No. 103-213, 103rd Cong., 1st Sess. 496 (1993) (emphasis supplied).

<sup>5</sup>*See Nat. Ass'n of Regulatory Utility Com'rs v. F.C.C.*, 525 F.2d 630, 641-42 (D.C.Cir.), *cert. denied*, 425 U.S. 992 (1976), and cases cited therein for the principle that common carriers need not serve the whole public, and that their services may be so specialized as to be of possible use to only a fraction of the total population.

<sup>6</sup>47 U.S.C. Section 332(c)(1) (1993).

<sup>7</sup>H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. 260 (1993).

## Classifying Small Companies as CMS Providers is Not a Problem

In spite of scattered suggestions that classifying small companies (such as dispatch companies) as CMS providers will result in difficulties for them, even the smallest company should *not* be disadvantaged by such classification.

*There is No Regulatory Disadvantage to CMS Classification.* Classifying small companies as CMS providers should not be a problem if CMS providers are subjected to permissive detariffing ("forbearance") -- as the Omnibus Budget Reconciliation Act clearly permits. As amended, the Act provides that *the Commission may subject CMS providers to forbearance by determining that enforcement of regulatory provisions are not necessary in order to (1) "ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;" (2) protect consumers; and (3) that such a finding is consistent with the public interest.*<sup>8</sup> The only provisions which may not be forborne are those obligating common carriers to furnish service upon reasonable request, providing for just and reasonable rates, prohibiting unjust and unreasonable discrimination, and authorizing parties to seek redress by application to the Commission.<sup>9</sup>

*If forbearance is applied, companies which are classified as CMS providers will suffer no new regulatory burdens or obligations, and will not have to change their contracts with their customers, nor the way they do business.* The rationale used to justify forbearance of non-dominant carriers in the Competitive Carrier proceeding will support a finding that CMS providers need not have to file tariffs, nor will they be required to file section 214 applications in order to initiate or terminate service, in order to serve the public interest. Sufficient evidence exists of competition in the mobile services marketplace to support such a finding.

Likewise, as the Commission's *Regulatory Parity Notice* tentatively concludes, such provisions as Sections 219 (annual and other reports) and 220 (accounts, records and memoranda; depreciation charges) do not directly protect consumers from unjust rates or other similar harms, while imposing costs of compliance which are out of proportion with the protections afforded by them. Thus, SMRs may be classified as CMS providers and subjected to forbearance, releasing them from burdensome regulatory requirements.

*There are Economic Benefits to CMS Classification.* Not only is there no disadvantage to small companies who are properly classified as CMS providers, there are important economic benefits. Classifying small companies as CMS providers will allow them to offer new services and features to their users, as new technologies are developed. For example, as CMS providers, traditional dispatch companies may be able to offer new digital applications in addition to their voice services. SMR spectrum could be used to provide a wireless data service just as FM radio

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<sup>8</sup>47 U.S.C. Section 332(c)(1) (1993).

<sup>9</sup>The amendment to the Act provided that the Commission would not forbear from applying Sections 201, 202 and 208 of the Act to CMS providers. 47 U.S.C. Section 332(c)(1).

broadcasters are able to provide data services and cellular companies simultaneously can provide voice and data service via Cellular Digital Packet Data (CDPD).

Spectrum is too scarce a resource to allow artificial regulatory restraints to frustrate development and deployment of the most efficient -- and highest valued -- technologies and services. Classifying SMR providers as CMS providers will create opportunities for more investor interest and developmental efforts by equipment manufacturers, as well as incentives for service innovation. In fact, CMS classification will enable SMR providers to offer full interconnection and allow them to serve a broader public, which private classification by and large would foreclose.

*Transition Period as a Safeguard.* To the extent that providers of services which were formerly classified as private land mobile radio services are affected by the creation of CMS, the Act provides a one year period for the Commission to adopt modifications to its rules in order to effect the transition to the new treatment of such services. Thus, there is no need to fear that a sudden shock will disrupt the mobile services marketplace, even with respect to the small SMR service providers.

### **Private Mobile Services and Functional Equivalence**

Private Mobile Services are and should be a much smaller body of services, clearly set apart from Commercial Mobile Services.

The Act itself defines Private Mobile Service as *"any mobile service (as defined in section 3(n)) that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission."*<sup>10</sup>

The legislative history of the Omnibus Budget Reconciliation Act makes it clear that Congress conceived of Private Mobile Services as a small subset of mobile services, intending to redress the growth of disparately-regulated but functionally-equivalent services after the establishment of private land mobile services as a classification in 1982.<sup>11</sup> Such largely unregulated services grew in capability and in availability to rival public, regulated services, with SMR alone serving over 1.5 million users. Congress therefore adopted regulatory parity to redress this situation, ensuring that "equivalent mobile services are regulated in the same manner."<sup>12</sup>

Examples of private mobile services would include such Part 90 services as the Petroleum Power Service and other, internally-oriented, non-commercial services which are not the functional equivalent of CMS.

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<sup>10</sup>47 U.S.C. Section 332(d)(3).

<sup>11</sup>Under the former Section 332, adopted by the Communications Amendments Act of 1982, P.L. No. 97-259, 96 Stat. 1087, 1096 (1982).

<sup>12</sup>House Report at 259.

**Functional Equivalence.** The Budget Act clearly directs that "functionally equivalent" services are to be treated in a like manner, *i.e.*, classified and treated as CMS. Services which meet the CMS definition are automatically to be so classified *as are services which are their functional equivalents even if not squarely within the CMS definition*. Thus, non-profit or non-interconnected services which are the functional equivalents of CMS services should be treated in a like fashion. Again, this will not result in the imposition of any new burden on such a service or its provider if CMS is subjected to forbearance.

*The appropriate tests to determine functional equivalence are product substitutability and customer perception.* This is consistent both with antitrust law and Commission precedent, both of which look to such indicia in order to determine the likeness of products or services.

Although the legislative history *permits* the Commission to make a determination of non-equivalency on the basis of an interconnected mobile service's failure to employ frequency or channel re-use to augment the number of channels available for its service, in conjunction with not making service available in a wide geographic area, this is not an appropriate finding.<sup>13</sup>

System capacity and service area size are not appropriate criteria for regulatory classification -- nor are they appropriate standards for a determination of "non-equivalency." Such criteria, in fact, invite inefficiency and balkanization of the telecommunications infrastructure by providing incentives for isolation and incompatibility, inasmuch as other service providers -- both wireline and wireless -- have knitted together separately-owned and operated exchanges and systems in multiple markets to make possible innovative and efficient nationwide service.

**Self-Classification.** Permitting licensees to select or self-classify themselves and their offerings as private mobile or CMS is appropriate with respect to services which are not clearly within the CMS definition and which are not the functional equivalent of CMS services, but any licensee that provides a CMS service must fully comply with the CMS rules.

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<sup>13</sup>Conference Report at 496.